A. Their thinking, as well as I could recall it, was one of sheer necessity to sign.

[805]

Mr. Nizer: I move to strike that out. I am not talking about their thinking, as you recall it.

By Mr. Nizer:

Q. I asked you whether there were other plaintiffs who wanted to go through with the settlement before Egnal threatened to withdraw.

A. As far as I can recollect, no one in particular was at that moment ready to sign.

Q. Would you be willing, if the correspondence that you refer to exists in Mr. Egnal's office rather than Mr. Poul's office, to authorize us to look at that correspondence with respect to this alleged withdrawl [sic] on his part?

Mr. Poul: I advise you not to.

The Witness: Under counsellor's advice, I would say no.

By Mr. Nizer:

Q. Now, the settlement did away with any threat to you to have to close your doors, didn't it?

A. No.

Q. You have kept your doors open from that date to this.

A. The threat was always there constantly.

[fol. 172] [806]

Mr. Nizer: I move to strike out the answer as not responsive.

* * * * * * *

[807]

By Mr. Nizer:

Q. I want it as a matter of fact and admission. You have been in business from the date of this settlement to this date, haven't you?

A. Yes, we have.

Q. And your business has grown during that period, hasn't it?

A. Yes, it has.

Q. And your volume has increased substantially during that period?

A. Not substantially.

Q. It has increased from roughly one thousand or fifteen hundred dollars of purchases from National Screen

[808]

to ten times that, hasn't it?

A. National Screen has taken on about ten companies in that time.

Q. Yes.

A. Therefore, our purchases have been diverted from Columbia and Fox and Universal and all companies to National Screen.

Q. Then, let's take a look at your gross sales. Have they increased during this period since the settlement?

A. Yes, they have.

[809]

[fol. 173] Q. How substantially? Give me the range.

A. Not substantially.

Q. Give me the range.

A. Very limited range, is about the best way I can tell you.

Q. No, give me the range in figures. Do you want to look at the reports, the tax records? Shall we read it off to you?

Mr. Poul: Why not put it on the record?

The Witness: We started in business at zero.

By Mr. Nizer:

Q. I am talking of the date of settlement, not when you started. I will read it into the record and if you want to make any comment about it, I don't mind. Your 1942 return, the year before the settlement, is $16,823 gross receipts. In 1949 it is $35,219.67. That is more than double, isn't it?

A. Yes.

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IN THE

Supreme Court of the United States

No. 163

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,
Petitioners,

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,
Respondents.

PETITION OF CHARLES LAWLOR AND MITCHELL PANTZER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANCIS ANDERSON,
2100 Girard Trust Building,
Philadelphia 2, Pa.,
Attorney for Petitioners.

GRAY, ANDERSON, SCHAFFER & ROME,
2100 Girard Trust Building,
Philadelphia 2, Pa.,
Of Counsel.

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

Q. Would you consider that a substantial increase?

A. A terrible increase.

Q. I say, would you consider it a substantial increase?

A. No, I think it is a very poor increase. In two years we had done much more, comparatively, than we did in the following eight or nine years, by comparison of gross. The second year in business was only the beginning. We hadn't scratched the surface of the territory, nor had we scratched it in '43, '44 or '45.

[810]

Q. And did your profits also increase from 1943 to 1949?

A. Comparatively——

[fol. 174] Q. I am not asking for comparative figures. Now, listen to my question, Mr. Pantzer. Your counsel sometimes objects to my being argumentative, and I think that should be addressed to you. Don't argue with me. Just answer my question.

A. I am trying to learn the true nature of the question.

Q. The simple question is, did your profits increase from 1943 to 1949?

A. Yes.

[fol. 175] In United States District Court

Excerpt from Transcript of Proceedings Before the Honorable William H. Kirkpatrick on October 20, 1953

"Mr. Nizer: May I ask Mr. Anderson to concede the authenticity of the renewal agreement in 1946, which is annexed to our answer, signed by your client?

"Mr. Anderson: Sure."

[fol. 88] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANTZER, Co-partners Trading as INDEPENDANT POSTER EXCHANGE,

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.

STIPULATION OF COUNSEL

It is stipulated and agreed, by and among the undersigned, counsel for all parties to this appeal, subject to the approval of this court, that the appellants will file and serve their brief on or before December 18, 1953, and that the appellees will file and serve their briefs on or before January 18, 1954.

Gray, Anderson, Schaffer & Rome. By (S.) Francis Anderson, 2100 Girard Trust Building, Philadelphia 2, Pennsylvania, Attorneys for appellants. (S.) Louis J. Goffman, 12th Floor Packard Building, Philadelphia 2, Pennsylvania, Attorney for Warner Bros. Pictures Distributing Corporation, appellee. (S.) Earl G. Harrison, 1719 Packard Building, Philadelphia 2, Pennsylvania, Attorney for National Screen Service Corporation, Columbia Pictures Corporation, Loew's Incorporated, Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., T C F Film Corporation (formerly Twentieth Century-Fox Film Corporation), United Artists Corporation and Universal Film Exchanges, Inc., appellees.

December 10, 1953. Approved: Kalodner, J.

[Stamp:] Received & Filed Dec. 10, 1953. Ida O. Creskoff, Clerk.

[fol. 89] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANTZER, Co-partners Trading as INDEPENDENT POSTER EXCHANGE, Appellants,

v.

NATIONAL SCREEN SERVICE CORP.; COLUMBIA PICTURES CORP.; EAGLE LION FILM, INC.; FILM CLASSICS, INC.; LOWE'S INCORPORATED; MONOGRAM PICTURES CORP.; PARAMOUNT PICTURES, INC.; REPUBLIC PICTURES CORP.; RKO RADIO PICTURES, INC.; 20TH CENTURY FOX FILM CORP.; UNITED ARTISTS CORP.; WARNER BROTHERS PICTURES, INC.

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued February 1, 1954

Before Goodrich, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed March 30, 1954

By GOODRICH, *Circuit Judge*

This suit arises upon a matter collateral to the distribution and exhibition of motion picture films. The plaintiffs ("Poster Co.") are engaged in the business of leasing advertising posters ("standard accessories") to exhibitors in the Philadelphia area. The defendant ("Screen Corporation") distributes standard accessories, specialty accessories and "trailers" in the Philadelphia area and on a nation-wide basis. Screen Corporation has been granted [fol. 90] exclusive licenses to distribute this material by all of the major moving picture producers.

In 1942 Poster Co. instituted a treble-damage suit against Screen Corporation and three of the eight producers who are defendants in the present action. Poster Co. also sought an injunction. By stipulation of the parties this suit was dismissed with prejudice on April 21, 1943. By a contract dated the same day, Screen Corporation agreed to furnish

Poster Co. with standard accessories and granted Poster Co. a nonexclusive license to compete with it in Philadelphia. This contract was renewed in 1946 for a five-year period.

In 1949 Poster Co. commenced the present action against Screen Corporation and the eight producers, and again sought an injunction and treble damages from 1943 to 1949. In 1951 Judge McGranery granted Poster Co.'s motion for summary judgment as to an injunction against Screen Corporation only, but a final decree was never framed. In 1953 Judge Kirkpatrick granted the defendants' motion to dismiss on the grounds that the 1942 judgment was res judicata of this claim.

The phase of the doctrine of res judicata here concerned is the effect of the 1942 dismissal with prejudice as a bar to the present suit. No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.[1] Nor is there any question [fol. 91] of merger of plaintiffs' claims by the 1942 judgment, because, by the dismissal with prejudice, the defendant is the record winner in the original suit.

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[1] "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . .

"(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Restatement, Judgments § 68 (1942). For provisions regarding questions of law, see § 70. The Supreme Court has recently held that when, as here, there has been no hearing, no stipulations of fact, no briefs filed, no oral argument, and no showing that the issues were determined by the court the judgment has no effect as collateral estoppel. United States v. International Building Co., 345 U. S. 502 (1953).

What did the 1942 judgment do to the possibility of recovery in this suit? It should be noted at the outset that our problem here is not affected by the fact that the dismissal of the 1942 action was by stipulation instead of the result of a trial on the facts and the law. A consent judgment or, like the one present, one which is a "dismissal with prejudice" has the same effect as a bar as if the case had gone to trial and the judgment rendered thereafter. 2 Freeman on Judgments 1395-96 (5th ed. 1925); United States v. Parker, 120 U. S. 89 (1887); Urbino v. Puerto Rico Ry. Light & Power Co., 164 F. 2d 12 (C. A. 1, 1947.

The decision of the case is going to depend upon whether the plaintiffs in the present suit are suing upon the "same cause of action" as that upon which they sued in 1942 and lost. If they are, then they are barred from suing again. If they are not, they may maintain this action. This Court struggled with the "cause of action" question in Williamson v. Columbia Gas & Electric Corp., 186 F. 2d 464 (1950), but the problem in that case was so different from the one here that we do not see that it materially aids our solution. It is recognized that the term may change its meaning when used in different situations. Restatement, judgments, Introductory Note p. 129 (1942). There is already a good-sized body of legal literature on the question of what constitutes a cause of action, a subject upon which learned doctors disagree. Some of the literature on the problems is reviewed "Res Judicata Reexamined" by Edward W. Cleary in 57 Yale Law Journal 339, 340 n. 7 (1948). Perhaps some words of that author (though not in context) show the difficulties here involved. He is talking about situations where a plaintiff splits his cause of action and he says at page 346: "In deciding such cases, the concept of a cause of action possesses real utility if applied with realization of what actually is at issue and with due regard [fol. 92] for the other factors herein discussed." This sounds easy if one says it fast. The core of our problem is to find out whether what is at issue is the same thing as what was at issue.

Some situations are easy to solve and those are the ones upon which it is easy to find authority. Take the case of a single isolated tort, for instance. A attacks B and beats

him. Six months later he does it again. Whatever judgment might be rendered, for either party, in a suit for the first battery would not be a bar to a suit for the second battery. Restatement, Judgments § 61, comment *c* (1942). The only possibility of its having any effect in the suit for the second battery would be the binding effects of collateral estoppel, if there were any. We have somewhat the same thing where the tort claimed is a repeated trespass to land by entering and cutting timber. Here, too, the invasion of the plaintiff's interest is a separate one each time and recovery or defeat in a first suit will not preclude a second unless some element of collateral estoppel is involved.[2] When the plaintiff's complaint is for a nuisance maintained by the defendant or for a continuing invasion of plaintiff's land, by a structure on the defendant's land, then the question becomes complicated with factors such as the permanence of the structure, whether the invasion can be abated by means of an injunction, and so on. Here the problems have become so complex that there is little to be gained by referring to analogies which, themselves, show only a state of confusion.[3]

All this leads up to the instant problem but does not solve it. We have a further difficulty. Conspiracy alone is not a tort although it may be a crime, as pointed out in the Columbia Gas case cited above. Acts done in pursuance of [fol. 93] the conspiracy become actionable when they hurt a plaintiff. On the other hand if the plaintiff complains about a conspiracy, asks for damages for acts done pursuant thereto and to have the conspiracy stopped by injunction, when he loses that lawsuit by judgment is he barred from thereafter claiming damages for other acts, or further acts, which he says are done in furtherance of the original conspiracy? We think he is, although neither counsel nor we have found an instance where on this very set of facts a court has so decided.

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[2] Avery v. White, 83 Conn. 311, 76 Atl. 360 (1910), discussed in 2 Freeman on Judgments 1305 (5th ed. 1925).

[3] See 2 Freeman, *op. cit. supra* note 2, at 1295 and following. For analysis of one state's difficulty along this line, see Goodrich, "Permanent Structures and Continuing Injuries—The Iowa Rule," 4 Iowa L. Bull. 67 (1918).

The following question then becomes the next one to answer. Did the plaintiffs in their 1942 suit base their claim upon essentially the same course of wrongful conduct of which they complained in 1949? Judge Kirkpatrick thought so and so decided. We agree. It is true that there are some additional allegations, some new acts which the plaintiffs say the defendants have done since the earlier suit. But we think in substance the complaint is the same and that what plaintiffs object to is an alleged combination of the defendants to do illegal things harmful to the plaintiffs' business and acts done pursuant to that combination. Since plaintiffs by their consent judgment in 1942 had an adjudication against their claim at that time we do not think they improve their position by reiterating essentially the same complaint in 1949.

Additional defendants were joined in the 1949 suit. Judge Kirkpatrick met this point as follows:

> "The defense of res judicata is available to those defendants in the present suit who were not joined in the 1942 action. In Bruszewski v. United States, 181 F. 2d 419, the Court pointed out that where 'res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have * * * enlarged the area of res judicata beyond any definable categories of privity between the defendants.' The only question is whether the relationship between all the defendants is close enough to [fol. 94] make it a fair and proper application of the policy of the law that there should be an end to litigation. I have no doubt that the relationship of the defendants in this case, taking into consideration the allegations of the 1942 complaint, is close enough to bring them all within the scope of the doctrine of res judicata."

We cannot improve upon this statement.

The plaintiffs claim that the 1942 suit was settled because of "duress." Of course it is not suggested that there was any physical compulsion. What is meant is that their economic position was such that this was the best settlement they could get. It is well settled that merely because one enters into an agreement which he would not enter if he did

not need the money there is not such duress as will void the contract. See Rector v. Sunerest Lumber Co., 52 F. 2d 946 (C. A. 4, 1931); and Restatement, Contracts, § 494 (1932). Lest this generalization be thought too sweeping it should be stated as a matter of caution that it does not apply to settlements of suits by railroad employees against employers for personal injuries, seamen's cases and the like.

The judgment will be affirmed.

A true Copy:

Teste:

_____, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 95] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANIZER, Co-partners Trading as INDEPENDENT POSTER EXCHANGE, Appellants,

v.

NATIONAL SCREEN SERVICE CORP.; COLUMBIA PICTURES CORP.; EAGLE LION FILM, INC.; FILM CLASSICS, INC.; LOEW'S INCORPORATED; MONOGRAM PICTURES CORP.; PARAMOUNT PICTURES, INC.; REPUBLIC PICTURES CORP.; RKO RADIO PICTURES, INC.; 20TH CENTURY FOX FILM CORP.; UNITED ARTISTS CORP.; WARNER BROTHERS PICTURES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Goodrich, McLaughlin and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and

[fol. 186] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

Charles Lawlor and Mitchell Pantzer, Co-Partners Trading as Independent Poster Exchange, Petitioners,

vs.

National Screen Service Corporation et al.

ORDER ALLOWING CERTIORARI.—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8734)

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IN THE

SUPREME COURT OF THE UNITED STATES.

No.

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,

Respondents.

PETITION OF CHARLES LAWLOR AND MITCHELL PANTZER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court (R 76a-84a) is unreported. The opinion of the Court of Appeals (R 89a) is reported at 211 F. 2d 934.

JURISDICTION.

The judgment of the Court of Appeals was entered March 30, 1954. A timely petition for a rehearing was filed April 14, 1954 (R 96a) and denied April 23, 1954 (R 101a). The jurisdiction of this Court is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED.

1. Will a consent judgment of dismissal of an anti-trust action, with prejudice, but without any actual adjudication by the court, prevent the plaintiff from bringing a second action, against the same parties, and based on continuance of the same conspiracy, but claiming relief only for restraints imposed and losses sustained subsequent to the termination of the first action?

2. If so, may plaintiffs maintain their second action against persons who were not parties to the first action but who joined the conspiracy after the termination of that action?

STATUTES INVOLVED.

Sherman Act (Act of July 2, 1890, 26 Stat. 209 USC, §§1, 2); Clayton Act (Act of October 15, 1914, 38 Stat. 731, 737, 15 USC §§15, 26).

STATEMENT.

Since December, 1940, petitioners have been proprietors of a business known as the motion picture poster renting business (R 11a).[1] The posters are displayed on the theatre premises for the purpose of advertising the current and coming attractions. They are generally called standard posters, or standard accessories (R 10a). Because of the fact that feature motion pictures are shown in a number of theatres in every locality the posters can be used over and over again, and therefore they are rented to exhibitors instead of being sold (R 44a-45a). Petitioners and others who are in the business of servicing exhibitors with supplies of these posters are called poster renters. Petitioners' business is limited to the area included in the Philadelphia motion picture district (R 44a, 46a-47a).

Since January, 1940, respondent National Screen Service Corporation (hereafter called National) also has operated a standard poster renting business, but on a national scale (R 11a, 56a). It competes with petitioners in the Philadelphia district (R 13a, 29a, 47a).

The other respondents are the eight major motion picture producing companies of America (R 28a-49a). They control the production and initial distribution of the standard posters relating to their pictures (R 10a-11a, 44a, 48a).

Prior to 1940,[2] all standard poster renters could obtain supplies of posters directly from all the eight major film companies without any difficulty (R 44a-45a, 59a); but in

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[1] Petitioner Charles Lawlor has been in this business since 1930 (R 44a).

[2] In that period National did not handle standard posters, but it was a well known national distributor of a more elaborate, but at that time less important, kind of poster known as a specialty, or "screen process" poster, and also short advertising films known as trailers (R 46a-46a, 57a).

January, 1940, two film companies, Paramount Film Distributing Corp. and RKO Radio Pictures, Inc., entered into written license agreements with National whereby National was given the exclusive right to obtain supplies of their standard posters for distribution in the United States,[3] and National thereupon entered the standard poster-renting business (R 52a, 46a). Since a poster renter must offer a service of posters of all major film companies, this grant of exclusive privileges to National appeared to sound the death knell for all the original poster renters, and, indeed, a large number of them promptly sold out to National (R 46a, 72a-74a). Petitioners, however, and some others, found a way —"with difficulty and at a high price"—to buy a stop-gap supply of Paramount and RKO posters from independent Canadian sources and thus managed to remain in business (R 47a). The other six film companies continued, for the time being, to sell their posters to all renters, including National, on equal terms (R 46a, 47a).

On February 6, 1942, a third film company, Loew's Incorporated, likewise granted National exclusive access to its standard posters (R 17a-18a); whereupon petitioners, and other still-surviving independents, on April 8, 1942 jointly commenced an antitrust action,[4] for damages and injunctive relief, against National, Paramount, RKO and Loew's (R 18a). Before any trial or hearing was had in that action the parties settled it. Specifically, on April 21, 1943, the plaintiffs and National signed a sublicense agreement whereby National agreed to sell plaintiffs supplies of such posters as were then under, or which might thereafter come under, National's exclusive control, and to permit the plaintiffs to distribute these posters, in competition

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[3] The film companies granted these licenses in consideration of National's agreement to share the profits (R 42a).

[4] Civil Action 2472, Eastern District of Pennsylvania (Supplemental Appendix).

with it, in the various localities in which the several plaintiffs had been doing business" (R 25a, 31a); and on April 23, 1943, all parties signed and filed a stipulation providing that "the action shall be dismissed with prejudice" (R 84a). On the same day the court signed an order reading "The action is dismissed with prejudice" (R 84a). This order was not founded on any independent consideration by the court, but was only a pro forma acceptance by the court of the naked stipulation of the parties.

Thereafter, at the times stated below, the other five major film companies granted National substantially the same exclusive licenses (R 18a, 51a-53a):

Universal Film Exchanges, Inc.—August 1, 1944
Columbia Pictures Corp.—April 22, 1945
United Artists Corp.—January 26, 1946
Warner Bros. Dist. Corp.—March 22, 1946
Twentieth Century-Fox Film Corp.—July 1, 1947

The present action, for damages and injunctive relief, was commenced against National and all eight film companies on August 18, 1949 (R 1a, 20a-23a). This action charged National, Paramount, RKO and Loew's with continuing to carry on the conspiracy alleged in the 1942 action, and charged the other five companies with having joined that conspiracy after the termination of the 1942 action (R 17a-18a). It also charged National with having monopolized the specialty-poster and trailer distribution businesses (R 12a-16a). The relief claimed in this action, is for restraints imposed and losses sustained since the termination of the 1942 action. More fully, the law of Pennsylvania establishes a six-year limitation period for tort actions of this kind,[6] and therefore petitioners claim only for losses sustained since August 18, 1943.

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[5] The sublicense granted petitioners authorized them to compete with National in the Philadelphia area only (R 31a).

[6] Act of March 27, 1913, 1 SM L 76 §1, 12 Purdon's Statutes §31.

With respect to the settlement agreement of the 1942 action petitioners averred that (R 18a):

> "(a) Plaintiffs aver that they entered into said contract against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether; and that the said contract was not a fair or equitable settlement of the litigation but was intended by the defendants to be, and was in fact, a means of perpetuating and extending NATIONAL'S monopolization of the motion picture advertising business." [7]

On October 20, 1950, petitioners, and the plaintiffs in three companion cases, moved for summary judgment for injunctive relief on the basis of the documentary evidence at hand; and, on July 25, 1951, the District Court, in an opinion by McGranery, J., held that the motion should be granted with respect to National, but that with respect to the film companies the proof then before the Court was not sufficient to establish scienter summarily (R 60a-71a).[8] Because of the difficulty of framing an injunction against only one defendant (R 71a) no final decree was entered.

Before trial could be had on the merits, to wit, on November 6, 1953, the District Court, by Kirkpatrick J., entered an order dismissing the action as to all defendants on the ground that the dismissal of the 1942 action is a bar to the

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[7] As was stated in **Radio Corporation v. Raytheon Mfg. Co.**, 296 U. S. 495, 463, 80 L. ed. 327, 330, 56 S. Ct. 297, 299, the trial is the only place "where the bond between monopoly and surrender can be shown with certainty and fullness." The inherently oppressive nature of the agreement, however, is at least partially described in the opinion of Judge McGranery sur petitioners' motion for summary judgment, **infra**, particularly at pages 64a-65a, 67a, and the consequences of petitioners' trying to compete with National under the agreement are described in the amended complaint, 6a et seq., particularly in paragraphs 27a-48a. Cf. **Ring v. Spina**, 148 F. 2d 647, 653 (2 C. 1945).

[8] Reported at 99 F. Supp. 180.

maintenance of this action under the rules of res judicata (R 76a-83a). On March 30, 1954 the judgment of the District Court was affirmed by the court below.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *United States v. International Bldg. Co.*, 345 U. S. 502, 97 L. ed. 1182, 73 S. Ct. 807 (1953). In that case, this Court settled the point that a voluntary withdrawal of an action, without any actual adjudication by the court, will not estop the plaintiff from reasserting the same basic contentions in a second suit on a claim for a subsequent period of time. More specifically, the Court held that the fact that the United States had agreed, in effect, to the entry of a consent judgment of dismissal, with prejudice, of a claim for additional income taxes for the years 1933, 1938 and 1939 was no obstacle to subsequent reassertion of the same contention ("challenging once more the correctness of the basis of depreciation"), for the years 1943, 1944 and 1945.[9] The Court concluded:

> "Certainly the judgments entered are res judicata of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown

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[9] For other cases demonstrating the difference between repeating the same claim and suing on a right which accrued subsequently out of the same basic situation, see **Cromwell v. Sac County**, 94 U. S. 351, 24 L. ed. 195; **United States v. Moser**, 266 U. S. 236, 242, 69 L. ed. 262, 264, 45 S. Ct. 65, 67; **Tait v. Western Md. R. Co.**, 289 U. S. 620, 623, 77 L. ed. 1405, 1408, 53 S. Ct. 706, 707.

to be on the merits would forever foreclose inquiry into the merits. 345 U. S. at 506, 97 L. ed. at 1188, 73 S. Ct. at 809."

Opinion of the Court Below.

The gist of the opinion of the court below is found in one sentence, as follows (R 93):

> "Since plaintiffs by their consent judgment in 1942 had an adjudication against their claim at that time we do not think they improve their position by reiterating essentially the same complaint in 1949."

But it is clear that in *United States v. International Bldg. Co., supra,* this Court held that a judgment of dismissal based upon the consent of the parties, without hearing, is *not* an adjudication, and that there is *no* objection to a plaintiff's "reiterating essentially the same complaint" with reference to a later period of time after suffering such a dismissal.

It might be added that, when taken as a whole, the opinion is quite complex. It consists of two distinctly inconsistent parts. The first part proceeds on the basis that "No question of collateral estoppel by the former judgment is involved because the case was never tried * * *", and that, therefore, plaintiffs must be barred, if barred at all, on the ground that the two suits they commenced involve the same cause of action; but any such conclusion would be so manifestly untenable that the court had to give it up.[10] The last words said on it were: "All this leads up to the instant problem but does not solve it. We have a further difficulty" (R 92). At that point the court began the second part of its opinion in which it expounded the actual holding

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[10] Such a holding would be in direct conflict not only with **United States v. International Bldg. Co., supra,** but also with at least three other Supreme Court cases: **Cromwell v. Sac County, United States v. Moser** and **Tait v. Western Md. R. Co.,** cited **supra,** page 7, note 9.

of collateral estoppel, as epitomized in the sentence quoted above.

2. Even in the absence of a conflict with superior authority, issuance of certiorari would be appropriate here because of the devastating effect of the decision on the integrity of the antitrust laws. The public welfare demands that no such decision should be allowed to stand without a determination by this Court of its absolute necessity. The undeniable, most extraordinary fact is that every one of the eight major film companies has agreed, in writing, to exclude all of National's competitors from a supply of posters; and yet the court below actually decides that petitioners, and other small proprietors of poster service businesses,[11] who stand badly injured by this flagrantly monopolistic scheme, cannot even obtain an injunction against the carrying on of the monopoly in the future. No court has ever decided that the scheme is lawful. Only once has a court passed on the merits of the case, and that was when the petitioners, and others in like position, filed a motion in the District Court for summary judgment in equity. That motion came before former Judge McGranery, and he held, in a painstaking opinion, that the exclusive license agreements are on their face so obviously unlawful that National Screen Service Corporation should be enjoined summarily (R 60a-71a). But now the respondents are given the go ahead signal to continue operation of their monopoly with the assurance that their prime victims will always be found muted and defenseless. It is submitted that the anti-trust laws stand sorely in need of vindication at the hands of this Court.

3. Five of the eight respondent motion picture companies were not parties to the 1942 litigation and could not have

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[11] The record discloses that other poster renters are in the same position as petitioners with respect to the defense of res judicata (R 60a, 62a, Supplemental Appendix).

been made parties because they had not yet entered the conspiracy. Therefore the instant suit should not have been dismissed as to those companies even if it be assumed that the court correctly dismissed as to the others. The case cited by the court, *Brusewzski v. United States*, 181 F. 2d 419, does not support the decision. There the relation between the defendants existed at the time of the first suit and amounted to that of principal and agent, not merely that of joint tort feasors. Cf. *Bigelow v. Old Dominion C. Min. & S. Co.*, 225 U. S. 111, 56 L. ed. 1009, 32 S. Ct. 641.

WHEREFORE, this petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

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